

December 13, 1995

INFORMATION: Use of Private
Wetland Mitigation Banks

Associate Administrator
for Program Development

HEP-42

Regional Administrators
Federal Lands Highway Program Administrator

A question has been raised by Region 10 concerning the use of private wetland mitigation banks to provide compensatory mitigation for wetlands impacts due to Federal-aid highway projects, as discussed in our July 5 memorandum. They asked whether or not requirements of the Uniform Act would be applicable to interests acquired in private wetland mitigation banks established without Federal funding participation.

The acquisition of properties assembled and developed into wetland banks prior to our project activities and without FHWA funding commitment are not subject to Uniform Act requirements, on the basis that the acquisitions were not specifically for a Federal or federally-assisted project. We cannot require private entities who acquire property to create wetlands for wetland banking purposes to comply with the Uniform Act if there is no tie to a federally-assisted project. The mere fact that the banked wetlands might eventually be used to mitigate wetland impacts on federally-assisted projects does not invoke the Uniform Act requirements.

If the acquisitions are, in fact, with Federal financial assistance for the purpose of creating a wetland bank, or with prior agreement that the banked wetlands will be used to mitigate impacts on a specific federally-funded or assisted project or projects, then those acquisitions should conform to Uniform Act requirements.

The key issue is whether or not the acquisition of property for wetlands banks is specifically for a mitigation of impacts on a federally-assisted project. If the answer is yes, then the Uniform Act applies. If the answer is no, then the Uniform Act does not apply. Caution must be exercised when making this distinction.

If the bank has received 404 approval and was established without any Federal funding participation prior to use of Federal-aid highway funds for acquisition of wetland mitigation credits, and was not planned to be totally in mitigation of impacts due to federally-funded or assisted projects, the Uniform Act requirements do not apply. The actions which the wetland bank developer took in carrying out their private activity can be viewed with regard to the Uniform Act in the same manner as are other actions taken by private parties without the benefit of Federal financial assistance in Section 101(4) of the Uniform Act.

Original signed by

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